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IN THE

Supreme Court of the United States

No. 71-52

ARTHUR THEODORE TAITANO and
JANE K. FUJIWARA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	5
1. Introduction	5
2. The Prosecutor's Comments to the Jury	6
3. The Anti-Racketeering Offenses	10
Reasons for Granting the Writ	11
I. There is a Conflict Among the Circuits on Whether a Prosecutor's Repeated Comments that the Government's Evidence Is Uncontradicted by "the Defendant" Is Tantamount to a Comment on the Defendant's Failure To Testify in His Own Behalf	11
II. The Appellate Court's Interpretation of the Phrase, "Laws of the United States" in 18 U.S.C. § 1952 To Include "Laws of the Territory of Guam" Conflicts with Well-Settled Canons of Statutory Construction Enunciated by this Court and Consistently Followed by the Lower Federal Courts	16
Conclusion	19
Appendix A, Opinion of the Court of Appeals	A.1
Appendix B, Judgment of the Court of Appeals	B.1
Appendix C	C.1
I. Extracts from the Prosecutor's Initial "Closing Argument"	C.1
II. Extracts from the Prosecutor's "Final Closing Argument"	C.3
Appendix D	D.1
I. Count VIII of the Indictment	D.1
II. Count IX of the Indictment	D.1

CITATIONS

Page

Cases:

Anderson v. Nelson, 390 U.S. 523 (1968) 12

Beck v. Johnson, 169 Fed. 154 (C.C.W.D. Ky. 1909) 16

Chapman v. California, 386 U.S. 18 (1967) 12

Desmond v. United States, 345 F.2d 225 (1st Cir. 1965) 12

Doty v. United States, 416 F.2d 887 (10th Cir. 1968) ... 11, 14, 15

Fontaine v. California, 390 U.S. 593 (1968) 12

Griffin v. California, 380 U.S. 609 (1965) 12, 13

Hayes v. United States, 368 F.2d 814 (9th Cir. 1966) 13

Hepburn v. Elzey, 2 Cranch 445 (U.S. 1805) 16-17

Hooe v. Jamieson, 166 U.S. 395 (1897) 17

Knowles v. United States, 224 F.2d 168 (10th Cir. 1955) 13

Merchants' Cotton Press Co. v. Insurance Co. of N. Amer., 151 U.S. 368 (1894) 17

New Orleans v. Winter, 1 Wheat. 91 (U.S. 1916) 16-17

Osborn v. Bank of the United States, 9 Wheat. 738 (U.S. 1824) 16

Rodriguez-Sandoval v. United States, 409 F.2d 529 (1st Cir. 1969) 11, 14-15

United States v. Baker, 364 F.2d 107 (3d Cir.), *affirming* 241 F.Supp. 272 (M.D. Pa. 1965), *cert. denied,* 385 U.S. 986 (1966) 18

United States v. Lyon, 397 F.2d 505 (7th Cir.), *cert. denied sub nom.* Lysczyk v. United States, 393 U.S. 846 (1968) 11, 14, 15

United States v. Whelpley, 125 Fed. 616 (W.D. Va. 1903) ... 18

United States *ex rel.* Champion v. Ames, 95 Fed. 453 (C.C. N.D. Ill. 1899) 17

United States *ex rel.* Leak v. Follette, 418 F.2d 1266 (2d Cir. 1969) 11, 14, 15

Page

Constitution, Statutes and Rules:

Constitution of the United States, Fifth Amendment . 2, 3, 13, 15, 18
Act of March 2, 1895, 28 Stat. 963 . . . . . 17, 18
Guam Penal Code 2, 9
18 U.S.C. § 5 . . . . . 3, 11, 16
18 U.S.C. § 1301 17
18 U.S.C. § 1952 . . . . . 5, 10, 11, 18, D.1
18 U.S.C. § 1953 18
18 U.S.C. § 2421 . . . . . 3, 5
18 U.S.C. § 2422 . . . . . 3, 5
18 U.S.C. § 2514 . . . . . 4, 10, 18
18 U.S.C. § 2516 . . . . . 4, 5, 10, 18
18 U.S.C. §§ 6001-05 4
18 U.S.C., Rule 52(b), F.R. Crim. P. 15
Organic Act of Guam, 48 U.S.C. § 1424 16
Pub. L. 91-542, Tit. II, §§ 227 (a), 260, 84 Stat. 930, 931, Oct. 15, 1970 4

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Arthur Theodore Taitano and Jane K. Fujiwara, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on May 11, 1971, in order to resolve a conflict of the First and Tenth Circuits against the Second, Seventh and Ninth Circuits on recurring constitutional questions relating to a prosecutor's comments on the failure of a defendant to take the stand and testify in his own behalf, as well as

to define the jurisdictional limits of one of the federal anti-racketeering statutes.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, reprinted in Appendix A to this Petition (hereinafter "App. A"), is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 11, 1971, and is reprinted in Appendix B to this Petition. A timely application for an extension of time to and including July 10, 1971, within which to file this Petition was made on May 28, 1971, and granted by Mr. Justice Douglas on June 2, 1971. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and Rule 22(2) of this Court's Rules.

QUESTIONS PRESENTED

1. Whether the prosecutor's comments to the jury that the evidence presented by the government was uncontradicted were manifestly intended or were of such character that the jury would naturally and necessarily take them to be comments on the failure of petitioners to take the stand and testify in their own behalf, thereby violating their Fifth Amendment privilege against self-incrimination, when such comments were emphasized by constant repetition, contained clear, direct and specific reference to petitioners, and were followed by pointed reference to the privilege against self-incrimination.

2. Whether the courts below were in error in holding that the "unlawful activity" allegedly conducted by petitioners in violation of the provisions of the Guam Penal Code cited in Counts VIII and IX of the indictment were "prostitution offenses in violation of the laws of the State

in which they are committed or of the United States," thereby making 18 U.S.C. § 1952 jurisdictionally applicable to the offenses alleged in Counts VIII and IX of the indictment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED[1]

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> "[N]or shall any person . . . be compelled in any criminal case to be a witness against himself . . . ."

18 U.S.C. § 5 provides in pertinent part as follows:

> "The term 'United States,' as used in this title in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone."

18 U.S.C. § 1952 provides in pertinent part as follows:

> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to— . . .
>
> "(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> "(b) As used in this section "unlawful activity" means (1) any business enterprise involving . . . prostitution offenses in violation of the laws of the State in which they are committed or of the United States. . . ."

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[1] Although several counts in the indictment were brought under the "transportation" and "enticement" provisions of the Mann Act; 18 U.S.C. §§ 2421, 2422; these provisions are not involved in the questions presented to this Court.

18 U.S.C. § 2514 provided in pertinent part as follows (emphasis added):[2]

> "Whenever in the judgment of a United States attorney the testimony of any witness, . . . in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or *any of the offenses enumerated in section 2516*, . . . is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify . . . subject to the provisions of this section, and upon order of the court such witness shall *not* be excused from testifying . . . on the ground that the testimony . . . may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify . . . nor shall testimony so compelled be used as evidence in any criminal proceeding . . . against him in any court."

18 U.S.C. § 2516(1)(c) enumerates the following offenses (emphasis added):

> "any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats of violence), *section 1952 (interstate and foreign travel or transportation in aid of*

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[2] On October 15, 1970, this provision was repealed by Pub. L. 91-542, Tit. II, §§ 227(a), 260, 84 Stat. 930, 931, and replaced by 18 U.S.C. §§ 6001-05.

racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property) . . ."

STATEMENT OF THE CASE

I. INTRODUCTION

In a nine count indictment brought in the United States District Court of Guam, petitioners were charged with knowingly transporting from Honolulu to Guam, on two separate occasions, two women for purposes of prostitution in violation of 18 U.S.C. § 2421 of the Mann Act. The first violation was alleged to have occurred on September 21, 1968 (Count I); the second on September 6, 1969 (Count II). Petitioners were also charged with violations of the "enticement" provision of the Mann Act (18 U.S.C. § 2422) and the "transportation in aid of racketeering enterprises" provision of the federal anti-racketeering statutes (18 U.S.C. § 1952) for both the 1968 and 1969 incidents.

The jury found petitioner Taitano not guilty on the three counts relating to the 1969 incident (Counts II, III and V), but guilty on all counts relating to the 1968 occurrence (Counts I, IV, VI and VIII). Fujiwara was found guilty on all counts concerning both the 1968 and 1969 incidents (Counts I, II, III, VI, VII, VIII and IX) (*see* App. A, at 1, *infra*).[3]

[3]Each defendant was fined $3,000 on Count I relating to the § 2421 offense. In addition, each defendant was sentenced to two years imprisonment on each count for which they were found guilty, the sentences on all counts relating to the same statutory provision to run concurrently, but the two-year sentences on the count or counts relating to § 2422 to run consecutively to the two-year sentence on the counts relating to § 2421, and the two-year sentence on the count or counts relating to § 1952 to be suspended with a two-year probation being imposed upon release from prison (*see* Tr. 630-32). "Tr." relates to the two volumes of transcript of record in the trial court.

2. THE PROSECUTOR'S COMMENTS TO THE JURY

Throughout his initial "Closing Argument" (Tr. 539-52) covering all counts of the indictment, the prosecutor made ten separate references on seven of the fourteen pages of argument in the record (Tr. 540, 541, 542, 544, 547, 548, 549) that the evidence presented by the government had been "uncontradicted" by petitioners. All of these references are set forth in Part I of Appendix C to this Petition.

In his "Final Closing Argument" (Tr. 567-73), the prosecutor made another five such references on four of the seven pages of argument in the record (Tr. 567, 568, 570, 571). These references are set forth in Part II of Appendix C to this Petition.

The prosecutor also made specific reference to petitioners. In his initial "Closing Argument" he commented (Tr. 544, App. C, Part I[5], *infra*, emphasis added):

> "Of course, these are only part of the evidence. So you ask yourself the question again: *Is there any evidence to the contrary? Have the defendants presented you anything upon which to make a finding that is any different?* Is it not the truth? Is there a mistake some place? Have the Government's witnesses lied? *There is nothing. The defendants have put on no testimony concerning what actually happened, all the way from Honolulu to Guam.* Once again we have only four witnesses."

And in his "Final Closing Argument" he stated (Tr. 571, App. C, Part II[5], *infra*, emphasis added):

> "The charges are against Arthur Theodore Taitano and Jane K. Fujiwara. These are the people who are accused of bringing people to Guam to break the laws. That is what they are charged with. Now, now the time has come for the people of Guam to stand up and say whether or not they are going to let them get away with it. Are you going to stand for it? This is the question. Are you? This is the question. *You look at the indictment and see*

> *whether these defendants have told you they haven't done what we have charged and I submit to you you will find nothing. Absolutely nothing.*"

Immediately thereafter, the government attorney made direct reference to the privilege against self-incrimination (Tr. 571-72, emphasis added):

> "He can talk all he wants to about immunity. But here, again, who is to say that the rights of a witness under our Constitution should be ridiculed. *Do you think this is fair, these people who have claimed a privilege against self-incrimination.* The law says they can do so. This is the way our Government operates. Just like I have got to prove to you beyond a reasonable doubt that the charges are true. Now what's wrong with that? I am not arguing with that. That is the burden I have. That is right. That is the way the United States runs its courts. I don't argue with it. It is fair. It should be. All right, *why argue with the fact that a person has a right against self-incrimination?* That is, *why use it against that person.* I don't think it is fair. *What do you think?*

As soon as the prosecutor finished his final argument, the trial court declared a recess until 9:30 the next morning (Tr. 573). No objection to the prosecutor's statement was made by defense counsel.

The next morning defense counsel requested "the Reporter to review his notes for any reference counsel for the plaintiff might have made during his closing arguments to the failure of defendants to take the witness stand" (Tr. 574). The record states that "after reading such notes the Reporter advised counsel he could find no such reference" (Tr. 574). Counsel thereupon went to the judge's chambers to discuss jury instructions.[4]

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[4] At the hearing on defense counsel's motion for a new trial, counsel explained why he had made no objection to the prosecutor's statements immediately following the final argument (Tr. 604-06):

Among the trial court's instructions to the jury was one relating to petitioners' privilege against self-incrimination (Tr. 584):

> "The Court will recall that on the . . . next to last day of the trial oral arguments were had in the afternoon and at that time it became so late that the Court decided . . . to simply take a recess until the following morning. During the course of the argument I was distracted at one point and wasn't listening that carefully to the argument. But as I represented to the Court later it was my impression that counsel had made the comment about failure of defendants to take the stand. . . . I did want to get to my feet at that time and make an objection but didn't for two reasons. One, frankly, I wasn't sure I was really right about that. It was just a strong impression, having been distracted by looking at the instructions, or something, on my desk. After the hearing, talking to one of my partners and Mr. Raker or one of the auditors of my case, they confirmed this impression.
>
> "The next morning before the Court convened, . . . I approached the Court and . . . advised the Court I was going to assign as misconduct on the part of counsel a comment to the effect that defendants had failed to take the stand. The Court at that time advised me that that was not the Court's recollection that any such thing was said and [government] counsel also represented to both the Court and myself that as far as he could recall he hadn't made any such statement, although I think the record bears out differently. . . . .
>
> "I then asked the Court for about ten minutes . . . to check with the Court Reporter and both Mr. Craske and myself and Mr. Kelly, the Assistant U.S. Attorney, joined us out here and Mr. Barnes did not read his notes back to us but we told him what we were looking for and he skimmed through his notes. . . , but as it turned out inadvertently he didn't catch this language we are complaining about.
>
> "So, at that point I abandoned the matter . . . Nevertheless, when trial was all over Mr. Gayle told me he was absolutely certain that that was what was said and my initial impression was correct and we have since ordered the transcript and the Court has the transcript now in the file and also has the excerpt before it in our motion.
>
> "I think if any case calls for overlooking the fact that no objection was made, I think this one does. For, after all, there was a complete exploration of this problem with Court and counsel and I think it is only inadvertent the objection wasn't made because I certainly stated my intention of making the objection until persuaded otherwise by this investigation that was made."

The trial court denied the motion for a new trial (*see* Tr. 619-22).

> "It is a Constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, the decision as to whether he should testify is left to the defendant, acting with the advice and assistance of his attorney. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by you or enter into your deliberations in any way."

On appeal, the Ninth Circuit rejected petitioners' argument that "the prosecutor in his closing argument commented on their failure to testify" (App. A, at 2, *infra*). The court reasoned (*id.*):

> "While we do not approve of this type of argument, we do not believe it was '. . . "manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify."', the test set out in *Hayes v. United States*, 368 F.2d 814, 816 (9th Cir. 1966). The argument refers only to the appellants' complete failure to refute the charges of transporting the prostitutes to Guam. Nothing is said, except possibly by remote inference, about the failure of the appellants to take the witness stand."

The court bolstered its reasoning by noting that counsel had made no objection to the remarks until the motion for new trial, and that, whatever the prejudice, it had been cured by the trial judge's instruction to the jury "on the constitutional right of the appellants not to testify" (*id.* at 3).

3. THE ANTI-RACKETEERING OFFENSES

Section 1952 of 18 U.S.C. prohibits transportation in interstate or foreign commerce with the intent to commit an "unlawful activity," defined as "any business enterprise involving . . . [*inter alia*] prostitution offenses in violation of the laws of the State in which they are committed or of the United States. . . ." Count VIII and IX of the indictment charged certain violations of the laws of the Territory of Guam as the basis for petitioners' alleged "unlawful activity" within the meaning of 18 U.S.C. § 1952.[5]

In the trial court, petitioners moved to dismiss the two counts of the indictment (VIII and IX) on the ground that the laws of Guam were neither "law of the State in which [prostitution offenses] . . . were committed" nor "laws . . . of the United States," and that therefore the two counts failed to allege offenses in violation of 18 U.S.C. § 1952 (Tr. 205-06, 490; *see* Tr. 207-14). The motion was denied (Tr. 214, 490).

Petitioners also objected to the trial court's grant of testimonial immunity under 18 U.S.C. § 2514 to five key government witnesses, including the four prostitutes allegedly transported to Guam (*see* Tr. 156-64, 224-26, 253-54, 298-99, 451-52). Petitioners argued that the immunity provision could only be triggered by "any of the offenses enumerated in section 2516," that the offenses proscribed by 18 U.S.C. § 1952 were the only offenses specified in 18 U.S.C. § 2516 which were relevant to the indictment for purposes of immunity, but that Section 1952 was not validly applicable to the offenses alleged in Counts VIII and IX and therefore could not be properly used to invoke the immunity provisions of 18 U.S.C. § 2514. The court rejected petitioners' position (*see, e.g.*, Tr. 156-64).

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[5]The text of Counts VIII and IX are set forth in Appendix D to this Petition.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the conviction on all counts, thereby resolving the issue of the applicability of 18 U.S.C. § 1952 against petitioners (App. A, at 3, *infra*). The Ninth Circuit relied upon 18 U.S.C. § 5, which defines "United States," as used in Title 18 "in a territorial sense," to include "all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone" (*see id.* at 3 n. 2). The court was thus holding that the laws of the Territory of Guam were encompassed within the term "laws . . . of the United States." The court did not focus upon whether the term "laws of the *State*," as used in 18 U.S.C. § 1952, included within its purview the laws of a *territory* such as Guam. Nor did the court focus upon why the term, "laws of the State," was required to be employed in the statute if the term, "laws . . . of the United States" included the laws of "all places" within the "territorial" United States, as that term is used in 18 U.S.C. § 5.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT AMONG THE CIRCUITS ON WHETHER A PROSECUTOR'S REPEATED COMMENTS THAT THE GOVERNMENT'S EVIDENCE IS UNCONTRADICTED BY "THE DEFENDANT" IS TANTAMOUNT TO A COMMENT ON THE DEFENDANT'S FAILURE TO TESTIFY IN HIS OWN BEHALF

The decision presented here for review perpetuates an as yet unresolved conflict of circuits, aligning the Ninth Circuit with the Second and Seventh Circuits against the First and Tenth Circuits. *Compare, e.g., United States ex rel. Leak v. Follette,* 418 F.2d 1266 (2d Cir. 1969), *and United States v. Lyon,* 397 F.2d 505 (7th Cir.), *cert. denied sub nom. Lysczyk v. United States,* 393 U.S. 846 (1968), *with, e.g., Rodriguez-Sandoval v. United States,* 409 F.2d 529 (1st Cir. 1969), *and Doty v. United States,* 416 F.2d 887 (10th Cir. 1968). The conflict centers around the con-

stitutionally permissible scope of the comments a prosecutor may lawfully make that the evidence presented by the government is uncontradicted by the defendant and whether such comments are tantamount to a statement by the prosecutor on the failure of a defendant to take the stand and testify in his own behalf.

As far as petitioners have been able to determine, the issue raised here is being presented to this Court for the first time. It was neither raised nor resolved in *Griffin v. California*, 380 U.S. 609 (1965), and *Chapman v. California*, 386 U.S. 18 (1967). In *Griffin*, this Court held that "the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt" (380 U.S. at 615). In *Chapman*, although the Court acknowledged that a violation of the *Griffin* rule could be harmless error, it required that, in order to establish such harmless error, the prosecutor would have to prove beyond a reasonable doubt that a violation of *Griffin* did not contribute to the verdict obtained or that there was no reasonable possibility that such violation might have contributed to the defendant's conviction. *See also Anderson v. Nelson*, 390 U.S. 523 (1968); *Fontaine v. California*, 390 U.S. 593 (1968).

Since *Griffin* and *Chapman*, there has been a burgeoning disagreement among the Circuit Courts of Appeals as to what extent less explicit remarks to the effect that the government's evidence is uncontradicted by the defendant are violative of the *Griffin* rule. It is now generally held that such a comment on uncontradicted evidence without more does refer to the defendant's failure to testify when the defendant is the only person who could or would have contradicted the evidence; whereas, when persons other than the defendant could have contradicted the evidence and did not testify, it is usually held that the prosecutor's comment did not necessarily direct attention to the defendant's failure to testify. *See, e.g., Desmond v. United States*, 345 F.2d 225 (1st Cir. 1965). On the other hand, there is a

serious conflict of circuits on whether the prosecutor's comments as to uncontradicted evidence violate the *Griffin* rule—regardless of whether the defendant is the only person who could contradict the government's evidence—if the comments are made repeatedly and thus have a cumulative effect or if the comments make a clear, specific and direct reference to the defendant himself.

In the present case, the prosecutor in his closing arguments stated to the jury that the evidence presented by the government was uncontradicted by petitioners. These statements concerning the government's uncontradicted evidence were persistently repeated—at least ten separate times in the prosecutor's initial closing argument (*see* App. C, Part I, *infra*) and five more times in the final closing argument (*see id.*, Part II). The prosecutor's statements also contained clear and specific references to the petitioners (Tr. 544, 571). Moreover, the persistent references to the uncontradicted evidence were followed immediately by an explicit reference to the privilege against self-incrimination (Tr. 571-72) in such a manner as to create the likelihood of confusion in the minds of the jury as to whether the Fifth Amendment privilege had application to the failure of petitioners to testify in their own behalf.[6]

Under the circumstances, "the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Hayes v. United States*, 368 F.2d 814, 816 (9th Cir. 1966); *Knowles v. United States*, 224 F.2d 168, 170 (10th Cir. 1955). The judgment should therefore have been reversed and the cause remanded for a new trial despite the technical failure

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[6]Presumably the prosecutor's reference was to the invoking of the Fifth Amendment privilege by seven of the government witnesses (Tr. 156, 224, 253, 298, 451, 480, 484-87), and the granting of immunity to five of them (*see* Tr. 156-164, 224-26, 253-54, 298-99, 451-52), but the reference was so unclear that in context it obviously created questions as to petitioners' failure to testify.

of defense counsel to object and despite the judge's brief instruction to the jury on the privilege against self-incrimination.

In each of the conflicting cases cited–*Leak* (2d Cir.), *Lyon* (7th Cir.), *Rodriguez-Sandoval* (1st Cir.), and *Doty* (10th Cir.)–the prosecuting attorney had also stated to the jury that the evidence presented by the government was uncontradicted, defense counsel had failed to object at the time, and the court had instructed the jury on the privilege against self-incrimination. In two of the cases, the prosecutor's statements relating to the uncontradicted evidence were repeated–approximately eight times in *Leak* (418 F.2d at 1267 n. 1) and five times in *Rodriguez-Sandoval* (409 F.2d at 530). *See also Doty*, 416 F.2d at 889. In the other two cases–*Lyon* (397 F.2d at 509) and *Doty* (416 F.2d at 890)–specific and direct reference was made to the defendants when the "uncontradicted" evidence was mentioned.

Both the First Circuit in *Rodriguez-Sandoval* and the Tenth Circuit in *Doty* held that the statements made by the prosecutor were tantamount to comments on the defendant's failure to take the stand to testify in his own behalf. The Ninth, Second and Seventh Circuits, on the other hand, considered the statements as merely a reference to defendants' "complete failure to refute the charges" (App. A, at 2, *infra*), or "proper advocacy concerning the strength of the prosecution's case" (*Leak*, 418 F.2d at 1268), or "a general review of the evidence" (*Lyon*, 397 F.2d at 509).

Neither the Ninth nor Second Circuits considered the repeated references by the prosecutor to the uncontradicted evidence as significant; nor did the Ninth and Seventh Circuits consider the specific references to defendants as requiring reversal. In contrast, the First Circuit in *Rodriguez-Sandoval* emphasized that "[t]he prosecution hammered the point home relentlessly, stating in at least five different ways that its version of the December 26

happenings was uncontradicted," and that "the very persistence of the government in making these remarks is proof that it attached much importance to them" (409 F.2d at 531). The Tenth Circuit in *Doty* emphasized the plain innuendo of the specific reference to the defendants (416 F.2d at 890):

> "When the prosecutor named the two [of eight defendants] who had testified and conceded that the evidence as to them was contradicted, can it be doubted that he commented upon the failure of the others to testify when he emphatically demanded the conviction of those who had not testified on the ground that: 'The evidence is uncontradicted.' The prosecutor's statement that the evidence 'has not been contradicted by the defendants' was little, if any, different in meaning, in the context of his argument, from a statement that the defendants had not testified."

In the view of the First Circuit in *Rodriguez-Sandoval* (409 F.2d at 531) and the Tenth Circuit in *Doty* (416 F.2d at 890), these references constituted plain error within the meaning of Rule 52(b), F. R. Crim. P., which could be noticed even though an objection had not been made, and jury instructions given. The Ninth Circuit here (App. A, at 3, *infra*), as well as the Second Circuit in *Leak* (418 F.2d at 1270) and the Seventh Circuit in *Lyon* (397 F.2d at 509), on the other hand, have attempted to bolster their decisions in favor of the government by citing the defendant's failure to object and the trial court's curative instructions.

Thus, the conflict of circuits on the present Fifth Amendment issues is sharp and extensive. Its impact cannot be narrowly confined but rather is likely to have continuing future adverse consequences to criminal defendants. The conflict can only be resolved by action of this Court alone. Petitioners therefore urge this Court to grant review to formulate criteria of conduct for the prosecutor relating to comments to the jury that touch upon a defendant's failure to testify.

II. THE APPELLATE COURT'S INTERPRETATION OF THE PHRASE, "LAWS OF THE UNITED STATES" IN 18 U.S.C. § 1952 TO INCLUDE "LAWS OF THE TERRITORY OF GUAM" CONFLICTS WITH WELL-SETTLED CANONS OF STATUTORY CONSTRUCTION ENUNCIATED BY THIS COURT AND CONSISTENTLY FOLLOWED BY THE LOWER FEDERAL COURTS

The Ninth Circuit's ruling that laws of a territory such as Guam are encompassed within the term "laws . . . of the United States" as used in 18 U.S.C. § 1952 conflicts with well-settled principles of statutory construction governing the terms, "laws of the United States" and "laws of the States."

Contrary to the Ninth Circuit's views, the term, "United States," as used in the phrase, "laws of the United States," is not and has never been used "in a territorial sense," as defined in 18 U.S.C. § 5, but rather is a term of art which means "acts of Congress." *Beck v. Johnson*, 169 Fed. 154, 162-63 (C.C.W.D. Ky. 1909). This is clearly what Chief Justice Marshall had in mind in *Osborn v. Bank of the United States*, 9 Wheat. 738, 825 (U.S. 1824), when he stated: "The case arises emphatically under the law [of the United States]. The act of congress is its foundation." And clearly this is what the Congress of the United States had in mind when, in its enactment of the judiciary provision in the Organic Act of Guam, 48 U.S.C. § 1424, it differentiated between the jurisdiction of the District Court of Guam "in all causes arising under the . . . *laws of the United States*" and the jurisdiction of other lesser courts to be established by the Guam Legislature, which jurisdiction was to be "prescribed by the *laws of Guam*" (emphasis added).

The Ninth Circuit's decision also conflicts with another fundamental canon of statutory construction derived from Chief Justice Marshall's opinions in *Hepburn v. Elzey*, 2 Cranch 445 (U.S. 1805), and *New Orleans v. Winter*, 1 Wheat. 91 (U.S. 1916), that, unless a federal statute is made

specifically applicable to the territories or possessions of the United States; either by definition or by manifest congressional intent, it cannot be held to apply to such territories or possessions. Thus, in *Elzey* and *Winter*, Chief Justice Marshall held that the word, "State," in the act conferring diversity jurisdiction on the federal courts was used in the constitutional sense as meaning a State of the Union and could therefore not be interpreted to encompass the District of Columbia or a territory of the United States. *Accord, Hooe v. Jamieson*, 166 U.S. 395 (1897); *Merchants' Cotton Press Co. v. Insurance Co. of N. Amer.*, 151 U.S. 368, 384 (1894).

This canon of construction has remained unchanged until the lower court's ruling and has especially been invoked with respect to federal criminal statutes. In *United States ex rel. Champion v. Ames*, 95 Fed. 453 (C.C.N.D. Ill. 1899), the court similarly held that, in the Act of March 2, 1895, 28 Stat. 963,[7] which prohibited the transportation of lottery tickets between States, the word "State" was used in the constitutional sense and could not be interpreted to include "territory" (95 Fed. at 456). The court reasoned (*id.* at 456-57):

> "Here is an act creating an offense unknown to the common law. It is a cardinal canon in the construction of criminal statutes that they should be construed strictly; that the courts have no right to extend their meaning beyond the scope of the terms employed; and we must seek for the intent of the lawmaking power in the language which has been used in the act itself.
>
> ". . . If congress desired to prohibit the transportation of lottery tickets into a territory of the United States, it should have said so. We may not enlarge the scope of a criminal statute to declare an offense which congress has not created. . . ."

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[7]The present 18 U.S.C. § 1301 is derived from the 1895 statute.

Accord, United States v. Whelpley, 125 Fed. 616 (W.D. Va. 1903) (holding the Act of March 2, 1895, not applicable to the District of Columbia).

Above all, the established definition of "State" was applied by the Third Circuit in its interpretation of 18 U.S.C. § 1953, a companion statute to the one involved here. *United States v. Baker*, 364 F.2d 107, 110 (3d Cir.), *affirming* 241 F. Supp. 272, 279 (M.D. Pa. 1965), *cert. denied*, 385 U.S. 986 (1966).

Thus, until the decision below, the federal courts have followed the basic doctrine of statutory construction that, whenever the Congress has intended the term, "United States" or "State," to mean something more than its constitutional meaning, that meaning has been expressly set forth in the statute.[8] Review of the Ninth Circuit opinion is therefore clearly appropriate to resolve the conflict that has now been engendered.

The importance of this second issue goes beyond the direct question whether Counts VIII and IX alleged offenses in violation of 18 U.S.C. § 1952. In the trial court, the five key government witnesses were granted testimonial immunity (*see* Tr. 156-64, 224-26, 253-54, 298-99, 451-52) under 18 U.S.C. § 2514. The immunity provisions of Section 2514, however, could only have been triggered by reason of the specific reference to 18 U.S.C. § 1952 in 18 U.S.C. § 2516. Thus, if the lower courts had held 18 U.S.C. § 1952 inapplicable to the alleged acts committed by defendants, no immunity could have been granted to any of the government witnesses under 18 U.S.C. § 2514, and none of them would have testified because they had all invoked their Fifth Amendment privilege against self-incrimination (*see* Tr. 156, 224, 253, 298, 451). As a result, the government would not have been able to prevail on any Count of the indictment.

[8]For numerous examples, *see* United States v. Baker, 241 F. Supp. 272, 279 n. 3 (M.D. Pa. 1965), *aff'd*, 364 F.2d 107 (3d Cir.), *cert. denied*, 385 U.S. 986 (1966).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* v. ARTHUR T. TAITANO and JANE K. FUJIWARA, *Appellants.*	No. 25,952

[May 11, 1971]

Appeal from the United States District Court
District of Guam

Before: KOELSCH, CARTER and KILKENNY, Circuit Judges.

KILKENNY, Circuit Judge:

In a nine count indictment, appellants were charged with knowingly transporting from Honolulu to Guam, on two separate occasions, two women for purposes of prostitution in violation of 18 U.S.C. § 2421 of the Mann Act. The first violation occurred on September 21, 1968 (Count I); the second on September 6, 1969 (Count II). Appellants were also charged with violations of 18 U.S.C. §§ 2422 and 1952 for both the 1968 and 1969 transportations. The jury found Taitano not guilty on the three counts relating to the 1969 incident (Counts II, III and V), but guilty on all counts relating to the 1968 transportation (Counts I, IV, VI and VIII). Fujiwara was found guilty on all counts concerning both transportations (Counts I, II, III, VI, VII, VIII and IX). This appeal followed. We affirm.

FACTS

The government's case consisted primarily of the testimony of the four prostitutes named in the indictment, who in essence told of the appellants inducing them to come to Guam for purposes of prostitution. The defense consisted entirely of the testimony of four prominent men, including two Guam legislators and the At-

torney General of Guam, who contradicted the evidence presented by the "girls" by denying that they had ever had intercourse with them. The appellants did not take the stand, nor do they challenge the sufficiency of the evidence to sustain the convictions.

CONTENTIONS

Appellants contend that: (I) the prosecutor in his closing argument commented on their failure to testify and that such comment deprived them of a fair trial; (II) Counts VIII and IX of the indictment did not state an offense against the United States; and (III) consecutive sentences were improperly imposed for the same offense.

I.

After a highly inflammatory closing argument by defense counsel challenging the integrity of the government's witnesses, the prosecutor in his response said, among other things. "You look at that indictment and see whether these defendants have told you they haven't done what we have charged and I submit to you you will find nothing." While we do not approve of this type of argument, we do not believe it was ". . . 'manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'", the test set out in *Hayes v. United States*, 368 F.2d 814, 816 (9th Cir. 1966). The argument refers only to the appellants' complete failure to refute the charges of transporting the prostitutes to Guam. Nothing is said, except possibly by remote inference, about the failure of the appellants to take the witness stand. Hence, this is not a case such as *Fontaine v. California*, 390 U.S. 593 (1968); *Anderson v. Nelson*, 390 U.S. 523 (1968); and *Griffin v. California*, 380 U.S. 609 (1965), where the prosecutor's comment on the failure to testify was extensive and the inference of guilt from silence was stressed to the jury. Rather, the statement of the prosecutor here is more akin to those before the court in *United States v. Cox*, 428 F.2d 683, 688 (7th Cir. 1970), *cert. denied* U.S. (1970); *United States v. Altavilla*, 419 F.2d 815, 817 (9th Cir. 1969); *United States v. Hephner*, 410 F.2d 930, 936 (7th Cir. 1969); *Miller v. United States*, 410 F.2d 1290, 1296 (8th Cir. 1969), *cert. denied* 396 U.S. 830 (1969); and *Samuels v. United States*, 398 F.2d 964, 965 (5th Cir. 1968), *cert. denied* 393 U.S. 1021 (1969), where in each case it was held that the remarks of the prosecutor were not prejudicial.

Fortifying our belief that the remarks of the prosecutor were innocuous in this case is the fact that the trial judge carefully instructed the jury on the constitutional right of the appellants not to testify, thereby curing any possible prejudice.[1] Additionally, we note that counsel for appellants made no objection to the remarks until appellants filed a motion for a new trial after return of the guilty verdicts. On the record before us, we cannot say that the prosecutor's argument constituted plain error. *Hayes v. United States*, 407 F.2d 189 (5th Cir. 1969), *cert. dismissed* 395 U.S. 972 (1969), and other cases cited by appellants, do not support their position.

II.

Next, appellants argue that 18 U.S.C. § 1952 does not apply to a territory such as Guam. This section is the basis of the offenses charged in Counts VIII and IX. 18 U.S.C. §5,[2] first called to our attention during oral argument, resolves this issue against appellants.

III.

Appellants contend that the court improperly imposed consecutive sentences on certain counts which, in appellants' view, allege the same offense. Taitano claims that Counts I and II charge him with the same offense as is charged in Count VI; Fujiwara claims that Counts I, II and III charge her with the same offense as is alleged in Counts VI and VII. The counts involve 18 U.S.C. §§ 2421 and 2422, respectively.

In *Batsell v. United States*, 403 F.2d 395, 400 (8th Cir. 1968), *cert. denied* 393 U.S. 1094 (1969), it was held that the offenses

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[1] "It is the Constitutional right of the defendants in a criminal trial that they may not be compelled to testify. Thus, the decision as to whether they should testify is left to the defendants, acting with the advice and assistance of their attorney. You must not draw any inference of guilt from the fact that the defendants do not testify, nor should this fact be discussed by you or enter into your deliberations in any way." (T.R., p. 621.)

[2] "The term 'United States,' as used in this title in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone."

proscribed by sections 2421 and 2422 are "separate and distinct." We have carefully analyzed the provisions of these two sections, and adopt *Batsell* as the law of our circuit on this issue. The consecutive sentences were not improper.

AFFIRMED.

APPENDIX B

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

No. 25952

ARTHUR T. TAITANO and JANE K. FUJIWARA,
Appellants.

APPEAL from the United States District Court for the District of Guam.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Guam and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 11, 1971.

APPENDIX C

I. EXTRACTS FROM THE PROSECUTOR'S INITIAL "CLOSING ARGUMENT" RELATING TO PETITIONERS' FAILURE TO CONTRADICT THE GOVERNMENT'S CASE, LISTED IN THE ORDER IN WHICH THE STATEMENTS WERE MADE AT TRIAL:[1]

[1] "[T]here are only four defense witnesses, Mr. Calvo, Senator Bamba, Senator Bordallo and Mr. Lujan. All of this testimony has one particular characteristic. Only one thing is common to the four of these men. They testify that Jeanne Dorsey was not right when she said she had had acts of sexual intercourse with them. *That is the only thing that the defense has raised a question about . . .*" (Tr. 540).

* * * * *

[2] "Did they [the defendants] in fact bring these girls over here for the purpose of prostitution? That's what the two girls said themselves, Domingo and Dorsey. They both testified why they came. They testified that they were making good money in Hawaii, they had no reason to come to Guam except through the request, except by being asked to come. They testified to a conversation taking place in their Honolulu apartment. If you will remember the situation, they both went through basically the same story. The people that were there: Momi, Jane, Blackie, the brother-in-law of Jane, also identified as Willie. These people sitting around and talking about Domingo and Dorsey coming to Guam. *You don't have anybody that disagrees with that. Who said anything to the contrary? Nobody. Nobody has put this fact situation in issue. Nobody has disputed that there was such a conversation,* that these things were said and the actions that the girls testified to actually occurred. Now this conversation was to the effect that they would be supplied tickets, get on the plane, Pan American, come to Guam, go to work as a waitress at the Gold Room, as a

[1] Tr. 539-52. All emphasis is added.

front, as a means by which they could carry on within Guam as prostitutes" (Tr. 541).

* * * * *

[3] "So, returning to count one as to Domingo and Dorsey and the two defendants, it charges them with doing this and *you have no testimony to the contrary*. And, as the Court will instruct you, your consideration is limited to the evidence which the Government and the defense has placed before you" (Tr. 541).

* * * * *

[4] "[D]id the defendants actually bring Suzette Kiilani or cause her to come to Guam for the purpose of prostitution, debauchery or other immoral purposes? *Who says anything to the contrary? What evidence is there before you which would cause you to dispute the testimony* of the one witness who tells you, *the two witnesses who tell you what happened?*" (Tr. 542).

* * * * *

[5] "Of course, these are only part of the evidence. So you ask yourself the question again: *Is there any evidence to the contrary? Have the defendants presented you anything upon which to make a finding that is any different?* Is it not the truth? Is there a mistake some place? Have the Government's witnesses lied? *There is nothing. The defendants have put on no testimony concerning what actually happened, all the way from Honolulu to Guam.* Once again we have only four witnesses" (Tr. 544).

* * * * *

[6] "I also submit that the conversations in Honolulu, *the only evidence that you have* is that they occurred in the same manner as set forth in the indictment" (Tr. 544).

* * * * *

[7] "You don't sit down and talk to people and bring them into your apartment for no purpose whatsoever, when you are basically complete strangers. They had not met each other before this particular night. *This is the uncon-*

tested testimony of both of these women, that they had not met either Teddy or Jane before this night" (Tr. 547).

* * * * *

[8] "This is a conversation that takes place in an apartment with two women partially dressed. *And the only testimony that you have before you is from these two women*" (Tr. 547).

* * * * *

[9] "The Government has given all this evidence in terms of what actually happened, how they came here, and the only people who really know the whole story, the girls themselves. *And who says anything to the contrary? What evidence do you have to look to which would say that this isn't what happened?* This is really your question. You are trying to recreate the situation, what happened, what is the story. *No one tells the story any different than they do. Who? No one*" (Tr. 548-49).

* * * * *

[10] "Jane . . . bought the tickets. If you have any questions about that, look at the exhibits the Pan American people brought in to you. Who was on the plane? It is all right there in the records of Pan American and it is in the testimony of these two women. *What more can you ask? The whole story has been told*" (Tr. 549).

* * * * *

II. EXTRACTS FROM THE PROSECUTOR'S "FINAL CLOSING ARGUMENT" RELATING TO PETITIONERS' FAILURE TO CONTRADICT THE GOVERNMENT'S CASE, LISTED IN THE ORDER IN WHICH THE STATEMENTS WERE MADE AT TRIAL.[2]

[1] "Counsel for the defendant seems to do very good in the negative at the defense. You notice throughout the trial the negative, the various actions basically negative in character. *What did he try to show?* He criticized, run down people, used the word whores. He used other words.

[2]Tr. 567-73. All emphasis is added.

These are his words. . . . What has he done, *what have the defendants done? You have got four men, that is all he produced . . .*" (Tr. 567-68).

* * * * *

[2] "Why shouldn't we, you, as the jury, why shouldn't the citizens get a little mad at these people for bringing prostitutes from outside? Why get mad at the girls? They are not the ones really behind it. They were propositioned. They were induced. The tickets were bought for them. All of this happened. *There is no opposition to it*" (Tr. 570).

* * * * *

[3] "So you want to listen to the testimony of these four people. . . . *[D]id they tell you anything* about the conference at the Iron Gate Restaurant at Waikiki Beach? *Did they tell you anything* about what airplane, about buying the tickets, the prepaid ticket advices, about the money, the tricks, the record of prostitution? *Did they tell you anything about that?* I think there is no question about it. *They didn't tell us one word about it. Not one word*" (Tr. 570).

* * * * *

[4] "Now you look at that indictment, you just look at it. What does it say? It charges these crimes, and *in response to all of these nine charges for these counts of bringing prostitutes into Guam*— Now these are serious accusations, and *what do they give us. Four men who say 'I didn't sleep with this gal'*" (Tr. 570).

* * * * *

[5] "The charges are against Arthur Theodore Taitano and Jane K. Fujiwara. These are the people who are accused of bringing people to Guam to break the laws. That is what they are charged with. Now, now the time has come for the people of Guam to stand up and say whether or not they are going to let them get away with it. Are you going to stand for it? This is the question. Are you? This is the question. *You look at the indictment and see whether these defendants have told you they*

haven't done what we have charged and I submit to you you will find nothing. Absolutely nothing" (Tr. 571).

APPENDIX D

I. COUNT VIII OF THE INDICTMENT (UNDER 18 U.S.C. § 1952)

"On or about the 13th day of September, 1968, in the District of Guam, ARTHUR THEODORE TAITANO and JANE K. FUJIWARA did travel and cause to travel in interstate commerce from Honolulu, State of Hawaii, to Agana, Territory of Guam, with the intent to promote, manage, establish, carry on, and facilitate the promotion, managment, establishment and carrying on of an unlawful activity, said unlawful activity being a business enterprise involving prostitution in violation of Guam Penal Code, Title IX, Chapter I, Sections 266(c), (e), and (f); also in violation of Guam Penal Code, Chapter VIII, Section 315, 316, and 318; all being laws of the Territory of Guam, and thereafter, ARTHUR THEODORE TAITANO and JANE K. FUJIWARA did perform and cause to be performed acts to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of said unlawful activities."

II. COUNT IX OF THE INDICTMENT (UNDER 18 U.S.C. § 1952)

"On or about the 6th day of September, 1969, in the District of Guam, JANE K. FUJIWARA did travel and cause to travel in interstate commerce from Honolulu, State of Hawaii, to Agana, Territory of Guam, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activitiy, said unlawful activity being a business enterprise involving prostitution in violation of Guam Penal Code, Title IX, Chapter I, Sections 266(c), (e) and (f); also in violation of Guam Penal Code, Chapter VIII, Sections 315, 316, and 318, all being the laws of the Territory of Guam, and thereafter, JANE K. FUJIWARA did perform and cause to be performed, acts to promote, manage, establish and carry on and facilitate the promotion, management, establishment and carrying on of said unlawful activity."